IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 62

FEDERAL TRADE COMMISSION,
Petitioner,
v.
COLGATE-PALMOLIVE COMPANY and
TED BATES & COMPANY, INC.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE AMERICAN ASSOCIATION OF ADVERTISING AGENCIES, INC. AS *AMICUS CURIAE*

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The American Association of Advertising-Agencies, Inc. files this brief *amicus curiae* pursuant to the written consents of the parties hereto. The consents have been filed with the Court.

Interest of *Amicus Curiae*

The 348 members of the American Association of Advertising Agencies plan, create and place some 75 percent of all national advertising. The Association strives to foster conditions in which good advertising and good advertising agencies can flourish. As part of that effort

it actively opposes advertising that is false or in bad taste.[1] It equally opposes limitations on the freedom of agencies to produce effective advertising that is truthful and in good taste.

The theory upon which the Federal Trade Commission has brought this appeal—namely, that the undisclosed use of mock-ups to communicate truthful advertising claims is *ipso facto* illegal—strikes at advertising effectiveness, not advertising dishonesty. The Commission looks upon this case as "a test case of major importance with respect to the Commission's power to prevent deception in television advertising, in the interest of both the consuming public and honest advertisers" (Pet. for Cert. p. 8). The Association considers, rather, that the power sought by the Commission would extend far beyond the prevention of deception or any other function that has been entrusted to it by law. The mere existence of such power would hamper the work of honest advertisers and advertising agencies without a particle of countervailing benefit to the public. The Association respectfully submits its reasons of law and policy why that power should be denied to the Commission and the decision of the Court of Appeals affirmed.

[1] Its members pledge that they will not knowingly produce dishonest or distasteful advertising as specified and condemned in its Creative Code. For many years it has conducted an Interchange of Opinion, operated jointly with the Association of National Advertisers since 1960, for the purpose of obtaining voluntary withdrawal or correction of objectionable advertising. The effectiveness of this program has been publicly cited. U. S. DEP'T OF COMMERCE, SELF-REGULATION IN ADVERTISING 37-43 (1964); KINTNER, AN ANTITRUST PRIMER 208-210 (1964); Address by the Hon. Paul Rand Dixon, Chairman, Federal Trade Commission, at St. Louis Regional Consumer Conference, April 16, 1964.

Question Presented

This brief will discuss the question: Does the Federal Trade Commission have the power under Section 5 of the Federal Trade Commission Act to prohibit the undisclosed use of mock-ups or product-substitutes in advertising to communicate product claims that are truthful in every material respect?

Statement

This statement treats only those aspects of the case that relate to the interest of the Association and its members.

The complaint charged that the respondents had violated Section 5 of the Federal Trade Commission Act by misrepresenting the moisturizing properties of Palmolive Rapid Shave Cream in television commercials. The commercials purported to show by a visual demonstration how sandpaper could be shaved with a safety razor after application of the cream. The demonstration did not employ sandpaper at all, but a simulated mock-up of sand on plexiglass (R. 35). The Commission found that sandpaper cannot be shaved under the conditions depicted in the commercials and concluded that respondents had therefore misrepresented the product's moisturizing properties in violation of Section 5 (R. 14-18). Upon appeal, the Court of Appeals for the First Circuit sustained the Commission in this finding and conclusion (R. 35-39).

The case, then, is basically one in which it has been determined that the respondents, through the use of a mock-up, made a misleading claim about the product advertised.

The Commission, however, proceeded to transform this case into a new and different one—a case it never brought

—by injecting the hypothetical assumption that sandpaper, contrary to its own finding, *could* be shaved exactly as depicted. The use of a mock-up to communicate such a claim, even though assumed to be truthful in every respect, would nevertheless, it held, have constituted unfair and deceptive advertising because the test "was, in reality, not taking place" (R. 18-21). On this theory the Commission entered an order that sweepingly proscribed the undisclosed use of mock-ups without regard to the truthfulness of the claims made for the product (R. 8).

The Court of Appeals rejected this theory and set aside the order *in toto* because it was "permeated" with the Commission's "fundamental error" (R. 39-43). The Commission thereupon renovated its opinion (R. 47-60) "to restate with clarity and precision the basis and breadth" of its findings and order (R. 98) and revamped its final order accordingly (R. 93-95). The restatement did not eradicate the "fundamental error." The Court of Appeals set aside the second order for the same reasons it had set aside the first and admonished the Commission to enter an order "confined to the facts of this case" (R. 139).

This tortuous procedure demonstrates that the Commission has indeed been "preoccupied with its broad opposition to mock-ups" (*ibid.*) rather than with the actual misconduct charged and found.[2] Since its pet theory does not emerge from the facts of the case, it has improvised a novel kind of order that cannot be justified by those facts in order to indulge a proposition constructed out of a hypothesis. The Association submits that this is an inadequate basis for presenting "a test case of major importance."

[2] The Commission's "unyielding hostility" to mock-ups was also noted by the court in *Carter Products, Inc.* v. *F.T.C.*, 323 F. 2d 523, 532 (5th Cir. 1963).

There are several major objections to this posture of the appeal. Of first importance is the lack of any evidence relative to the use of mock-ups to convey a truthful product claim. The testimony before the hearing examiner focused on the question whether the sandpaper test could or could not be performed as depicted on the television screen, and that issue was determined against the respondents. What the record contains about the non-deceptive use of mock-ups rests, not on evidence, but on nothing better than matters of assumed common knowledge, chance personal observations and reactions, surmises, speculations —altogether a shaky foundation on which to predicate a request for new and far-reaching powers.

In the second place, the evidentiary vacuum respecting the honest use of mock-ups tends to be filled up by inferences from a deceptive use. Indeed, the Government's obsession with the idea of deception infects and colors its argument throughout. Its very framing of the question presented assumes that the test is "in truth a sham" (Gov't Br. p. 2), and epithets like "sham" "rigged," "tricked," and "fake" pepper its brief (pp. 3, 8, 10, 11, 16, 17, 19, 20, 21, 25). From this commingling of the honest with the dishonest springs its "fundamental error," as the argument will show.

Finally, in an attempt to play down the practical consequences of its theory of mock-ups, the Government claims that the Commission's revised order applies only to their use in the presentation of a "test, experiment or demonstration in the nature of a test or experiment" and "does not reach the use of substitutes in the great majority of television commercials: those which merely state and portray a product claim" (Gov't Br. p. 18). The order, therefore, it is contended, "does not interfere with any legitimate need of sponsors" (*Ibid.*). Whether this distinction is

viable with reference to the terms of the order is one thing; the precise meaning of the order is best left to the parties. But if the distinction *is* viable, then what the Commission is seeking in the order encompasses substantially less than the full scope of its theory of mock-ups as restated "with clarity and precision" in its second opinion. Thus, to the extent that the Court may be swayed by consideration for the legitimate needs of advertisers and advertising agencies, the Association respectfully urges that it should not overlook the implications that the Commission is likely to draw if its order is approved.

The Association in its argument will first explore what those implications may be with reference to the legitimate needs of advertisers and advertising agencies. This will provide an appropriate context for its basic contention that the Commission's theory of mock-ups is utterly misconceived.

SUMMARY OF ARGUMENT

According to the Commission's own formulation, its theory of mock-ups extends beyond their use in tests or experiments in any narrow sense. While it would permit the use of substitute materials in "a casual or incidental display," it objects to any use that is "material to the selling power" of a commercial. Since the appearance of a product ordinarily provides a major inducement to its purchase, there seems to be no definite limitation to the possible application of the theory or its interference with the legitimate needs of advertisers and advertising agencies.

The record before the Court does not evidence what those legitimate needs are. The Brief gives some

examples to illuminate the gap in the evidence and provide a clue to the complexity of the problems of achieving a realistic and faithful portrayal of objects on film or tape. The presentation of truthful claims may be needlessly burdened if mock-ups can be prohibited as *per se* illegal.

The undisclosed use of mock-ups in communicating a truthful advertising claim does not result in any deception of the consumer and accordingly cannot constitute an unfair or deceptive trade practice. The advertiser uses photographic images, like words, to communicate a proposition about his product. That proposition does not refer to an object in the studio but to something the consumer can buy, and the consumer so understands it. If he is induced to buy the product and verifies, or can verify, the truth of the proposition about it by which he was so induced, no deception has been practised upon him.

The Commission's theory does not relate to any propositions *about the product,* but solely to the technique of communicating such propositions. It has evolved an abstruse concept of implied "added representations" concerning the veridical nature of photographic images. This concept originates in a two-fold error: (1) its failure to recognize that the camera is only a tool, not an automatic certifier of truth, and (2) its inability to disentangle the honest use of mock-ups from a situation of deceptive use.

The power to regulate the use of mock-ups would add nothing to the Commission's present ability to prevent unfair and deceptive advertising practises. It would merely impose burdens and uncertainties on honest advertisers and advertising agencies and thereby hinder good-faith efforts to create effective advertising. Owing to the complexity of the advertising process, no procedure for

prior review of advertisements by the Commission, even if otherwise justifiable, could work. The hypothetical nature of this appeal and the lack of evidence relating to the legitimate use of mock-ups suggest that the Court should refrain from adopting a *per se* rule respecting the illegality of mock-ups and should affirm the judgment of the Court of Appeals.

ARGUMENT

I.

The theory propounded by the Commission to justify its order herein implies the existence of a broad and ill-defined power in the Commission to regulate the non-deceptive use of mock-ups in all kinds of advertising media.

A. The Nature of the Power Asserted by the Commission.

Whatever may be claimed as to the limitations of the Commission's third final order herein, the Commission's theory of mock-ups, as restated "with clarity and precision" in its second opinion, plainly extends beyond their use in tests or experiments in any narrow sense. The Commission there concedes that it may be permissible, because of technical deficiencies in the photographic process, to use substitute materials "in a casual or incidental display of a product that cannot be faithfully reproduced on the television screen" (R. 51). The true distinction is "between mock-ups that are used in demonstrations designed to prove visually a quality claimed for a product and are thus material to the selling power of a commercial, and those that are not" (*Ibid.*). By way of illustration,

the Commission would not object to "showing a person drinking what appears to be iced tea, but for technical photographic reasons is actually colored water, and saying 'I love Lipsom's tea,' assuming the appearance of the liquid is merely an incidental aspect of the commercial, is not presented as proof of the fine color or appearance of the tea, and thus in no practical sense would have a material effect in inducing sale of the product" (*Ibid.*). The Commission likewise would not object to the use of substitutes for ice cream or the foam on beer "in casual or incidental displays of the product, so long as the commercial does not seek thereby to prove visually the longevity or fine appearance of the product" (*Id.*, n. 1).

"Proof" of color or fine appearance does not require a "test or experiment or a demonstration in the nature of a test or experiment." All it requires is an image of the product. Pictures may demonstrate such qualities when they appear in printed advertisements just as fully as when they appear on television screens. Audible qualities may be portrayed on radio. It is difficult to comprehend, then, why the theory behind the Commission's order, if not the order itself, does not reach the use of substitutes in advertisements "which merely state and portray a product claim." Under what circumstances, moreover, does the Commission imagine that the "fine color or appearance" of an advertised product is merely incidental and not "material to the selling power" of the advertisement? Can the Commission really mean that it is material if the copy expressly alludes to the appearance and not when the appearance is allowed to speak for itself?

These few considerations are enough to indicate that the ambit of the Commission's theory, though restated with all the "precision and clarity" it can muster, remains

both extensive and ill-defined. What certainty can honest advertisers and advertising agencies have that their legitimate needs will not be interfered with?

B. The Legitimate Needs of Advertisers and Advertising Agencies.

As stated above, the record is empty of evidence about the needs of advertisers and advertising agencies to use mock-ups, substitutes and the like in producing honest, effective advertising. There is recognition in opinions and arguments that photographic or video images do not necessarily convey the true color or texture of the object being photographed or televised, a fact frequently referred to as a "deficiency" in the photographic process (*e.g.*, R. 51).[3] It is also recognized that conditions, such as the heat of studio lights or the time-span required for takes may destroy or alter the object while it is being recorded (*e.g.*, R. 131, n. 2). Certain standard examples are reiterated—blue shirts, ice cream, the foam on beer—examples that might seem trivial, and that is all.

What is said here is not intended to supply any gap in the evidence, but merely to illuminate the nature of the gap that does exist. Mock-ups do fulfill a substantial need that may stem from a variety of causes other than the character of the image-making process.

Such a cause may be nothing less than the necessity for producing the advertising before the product to be advertised has come into existence. A conspicuous example is the advertising of new-model cars, which are introduced each year around the first of October in a multitude of body styles and colors. Production of the new

[3] The hearing examiner found that sandpaper, when placed under a television camera "appears to be nothing more than plain, colored paper; the texture or grain of the sandpaper is not shown" (R. 12).

models does not start until sometime in August, much too late to begin taking the photographs that must appear on announcement day in television commercials, magazine and newspaper advertising and the brochures distributed to thousands of dealers. "Hand made" cars, built to test engineering design and identical in construction, operation and appearance with the cars that will later roll off the assembly lines, are available for photography in a few body styles, but are far too costly to be made in all. The only practicable solution has been to use non-operational mock-ups having body shells made of plastic, fiberglass or clay and lacking engines, seats and other essential features of a real car. Care is taken in building and photographing the mock-ups to ensure accuracy in every visible detail, so that the appearance of the mock-ups in the photographs will be indistinguishable from that of the subsequent production line counterparts.[4] Car dealers who can have only two or three body styles on display in their showrooms must depend on these photographs of mock-ups in selling other new-model styles to their customers. Consumers, eager for a new-model car, may have no other guide to the style they wish to order without delay.

Similar problems may attend the introduction of new models of washers, refrigerators and other expensive hard goods items.

Design and color, as well as performance, are unquestionably of major importance to consumers in selecting cars, kitchen equipment and a host of other products. In the case of products such as cosmetics, the appearance *is*

[4] The advertising and engineering staffs constantly cross-check to ensure that last-minute changes in body-trim, hub caps, etc. will be accurately portrayed. The realism and accuracy so obtained surpass what can be achieved through an artist's rendering.

the performance. But to demonstrate on film the effect of cosmetics, they must be applied more heavily than in real life.

The quality of the *ingredients* used in a product may often provide a significant point of appeal to the consumer yet defy illustration. For example, the flavor of coffee is affected by the age of the coffee beans selected for the blend. Aged coffee beans do not in actuality resemble green beans but cannot be told apart when filmed. The true difference may be conveyed through plastic beans or by coloring the aged beans.

Resort to larger-than-life reproductions or to microphotography may be necessary to show minute features of the *structure or composition* of a product at a range too close for the human eyes to focus.

The use of substitutes for the object shades over into the area of altering the appearance of the object or tailoring the recording process. The true rendering of colors may call for color correction, which may be obtained by tinting the objects or putting a filter over the lens.

Realistic representation may require polarized or infrared light. The retouching of color transparencies is widely practiced in magazine advertising.

Events unfold in time, and seldom is the whole sequence of events that demonstrate a product claim contained within the 60 seconds or less allotted to a commercial. Actual time must be compressed on the screen through conventions accepted by the viewer.

These examples give only a clue to the numerous and complex problems of achieving a realistic portrayal of objects on film or tape or by other recording techniques. Whether the solution is to use a mock-up, or to alter the appearance of the product, or to adjust the recording

process would seem to make no difference in logic, *provided* that the purpose and effect of every such treatment is the accurate and faithful representation of the reality, not its falsification.

It is therefore submitted that the Court cannot appreciate the value of mock-ups in advertising on the basis of the present record. The presentation of truthful claims concerning the color, composition, structure or operation of a product may be burdensome, needlessly expensive or completely impracticable unless a mock-up can be used. Such use is not incidental but vital to the selling power of the advertisement.

II.

The undisclosed use of a mock-up or other product-substitute in communicating a truthful advertising claim is not an unfair or deceptive trade practice.

The Commission's theory of mock-ups cannot be considered dispassionately as long as it is muddied by colorations infused from its findings in the case before it. Since it is a hypothetical case that the Commission presents, the Commission should be held to the strict measure of its own assumed premise. The adjectives that spice the Government Brief—"sham," "rigged," "fake" and the like—do not inhere in that premise. We are entitled to assume that an honest advertising agency, seeking to create an honest and effective selling message for an honest advertiser, finds it desirable or even necessary, for reasons that may be more or less compelling but are nonetheless innocent, to use a mock-up in communicating a truthful claim about the advertised product. The Com-

mission says that the failure to disclose such use, no matter how truthful the product claim, is *ipso facto* a material deception of the consumer.

Under the Commission's theory it makes no difference that the product when bought by the consumer will correspond in every material respect with what he was led to believe by the advertisement. It makes no difference that the product looks the way he expected, performs the way he expected, is made of the materials and in the fashion he saw depicted, and can pass every test and meet every specification claimed for it in the advertisement. Wherein, then, lies the deception? According to the Commission, in a "false representation" as to what is going on before the camera, "intended and calculated to influence purchasers in making their purchasing decisions" (Gov't Br. pp. 11-12).

This position fundamentally confuses the meaning of a statement with the process by which it is communicated.

Advertising is the counterpart in selling of the machine in production. The advertiser does not come to the door like a salesman, holding out a product that can be seen, felt, handled, demonstrated and hopefully sold on the spot. He presents to the consumer, not the product itself, but a communication about it. The communication may be by words, oral or written; by drawings, cartoons, paintings and other art work; by photographic and other chemical or electronic recording devices, in a bewildering variety of techniques. But whatever the means employed, the communication can never take the place of the product itself in all its immediacy. At most it can symbolize, represent, or convey ideas or propositions about the product; it cannot grasp or reproduce the physical reality.

We recognize without much trouble that this is true when a proposition about a product is stated in words,

but it is no less true when the proposition is stated in pictures. Nobody believes that the image on the television screen is the product or even that it resembles the product in more than a superficial or conventional sense. No black and white image, for example, ever really resembles the colorful reality; it simply *tells* us things, conveys information, about the reality. In advertising, the image does not pretend to substitute for the product. Its function is to communicate ideas or propositions about the product in a way that is more lucid, vivid or informative than words alone could accomplish.

The viewer watching a commercial, like the reader of a printed advertisement, understands that the proposition being conveyed to him by words and pictures concerns a product he is being urged to buy. He understands that this product is not the object in the studio being taped or photographed or televised, but something offered for sale by the advertiser that he can shop for in a supermarket or order from a dealer. If he is induced to buy the product and verifies, or can verify, the truth of the proposition about it by which he was so induced, the expectations aroused by the advertisement will not have been disappointed and no deception will have been practised upon him.[5]

The Commission's opposition to mock-ups, then, is absolutely unrelated to the truthfulness or falsity of *any* proposition *about the product* that is offered for sale; it

[5] The word "product," of course, refers not to any single thing but to a class of similar things, and the propositions about a product communicated by an advertisement are therefore general propositions about a class. They are truthful if they hold for the class as a whole, though an occasional member of the class may be defective. The purchaser who gets a "lemon" may have a claim against the seller or manufacturer; this does not mean the product claim was false.

relates solely and entirely to what are claimed to be misrepresentations about the *method of communicating* such propositions. The argument from so-called "extrinsic factors" (Gov't Br. pp. 13-15) does not support this unprecedented excursion from the purview of the Federal Trade Commission Act. Representations about the origin of a product, or how it is distributed, or who has used it with delight, are all propositions *about the product,* not about the way such propositions are communicated. Thus cases like *Federal Trade Commission* v. *Standard Education Society,* 86 F. 2d 692 (2d Cir. 1936), *modified,* 302 U. S. 112 (1937) do not reach the issue of truthful mock-ups which do not hold out false inducements. Neither do the supposed analogies proffered by the Commission (Gov't Br. p. 15). A false representation that a testing agency has "certified the capacity" of a product falls in the same category as a false testimonial—they are both false propositions *about the product.*

The key to the Commission's "fundamental error" lies in its statement that the respondents "sought to exploit the popular belief that 'the camera doesn't lie'" (R. 49; Gov't Br. p. 5). The error is two-fold: (1) it attributes to photographic and similar techniques of communication a kind of superveridical magic they do not possess and nobody, not even the Commission, actually believes they possess; and (2) it mixes up the honest and the dishonest use of mock-ups.

To say that the camera doesn't lie is equivalent to saying that the typewriter doesn't lie. The camera is no more than a tool for producing images the character and significance of which depend upon human skill guided by human purpose. A dozen variables, all subject within limits to human control, may be combined in a thousand ways to achieve the ultimate image: film, lens, lighting,

filter, exposure, focus, camera angle, development of the negative, printing of the positive. Which is the combination that "doesn't lie"?

The American public is subject to no illusion about the camera's veracity. It has been raised on King Kong and Superman and is conversant with the blue shirts and make-up worn by political candidates. It can argue the probative value of umpire's call versus camera shot on a disputed play and is not unaware that Audrey Hepburn sings Eliza with the voice of Marni Nixon. It owns cameras by the millions, snaps pictures by the billions and awaits the uncertain results with foreknowledge of their unpredictability. "The camera doesn't lie" is not a popular belief, it is a popular quip.

What, then, becomes of the Commission's idea that the communication of a product claim by means of photographs automatically imparts a special authenticity over and above a claim expressed in words—an extra guarantee of truthfulness, a "proof" that is supposedly belied by the undisclosed use of mock-ups? And if the camera is to be cast in the role of an independent witness or "certifier," must there not also be disclosure of every facet of the particular photographic technique employed?

How an image on a television screen can furnish independent "experimental proof" of a claim (Gov't Br. pp. 19-20) defies the imagination. The "revolutionary capability of television" is *not* "to demonstrate the truth of claim," but to demonstrate a truthful claim more completely and vividly than words alone can do. A picture can show, better than words can tell, just how a cleanser will remove stains. It communicates visually a claim for the product, in that sense it "demonstrates" the claim, but it does not, and by its nature cannot, "prove" or

verify the truthfulness of the claim. The proof lies in the experience of the person why buys and tries the cleanser out.

This whole idea of the Commission that the purpose of mock-ups is to overcome the skepticism of viewers, "to hold out something beyond the sponsor's say-so as proof of the truth of the sponsor's claims" (Gov't Br. p. 11) proceeds from its "fundamental error" of mixing up the honest and the dishonest use of mock-ups. Its basic premise, that there was a false and material representation through the use of a plexiglass model to demonstrate the shaving of sandpaper (Gov't Br. pp. 10-12), never gets extricated from its finding that the claim so demonstrated was not a truthful one. If it had been truthful, then the "doubting Thomas" who was led to exclaim "By golly, it really *can* shave sandpaper" (R. 21; Gov't Br. p. 11) would have found, if he had tried, that it really *could*.

To recapitulate, an advertiser who uses photographs, rather than words alone, to demonstrate a product claim is simply communicating a visual proposition about the advertised product. He represents that the visual proposition, like a verbal one, is truthful, but he does not "add an additional representation" that the visual image, merely because it is a photographic image, vouches for its own truthfulness. His communication is not about the image or how it was made, but *about the product* offered for sale, and its truthfulness or falsity is tested by the experience of the person who buys the product. This situation is not changed in any respect when the advertiser uses a mock-up to communicate a truthful proposition. He has not thereby deceived the consumer or engaged in an unfair or deceptive trade practice.

III.

The power sought by the Commission to regulate the non-deceptive use of mock-ups is not requisite to its administration of the Act, the protection of honest competitors or the vindication of the public interest, and it would needlessly interfere with honest and effective advertising.

The sweeping rule of *per se* illegality of mock-ups for which the Commission is contending would add nothing to its present power to prevent deceptive trade practices. If an advertiser dishonestly employs a mock-up to communicate an untruthful product claim, the Commission already has ample power to issue a cease-and-desist order. If, on the other hand, an advertiser uses a mock-up honestly to communicate an absolutely truthful product claim, does the Commission maintain it would be justified in devoting its not unlimited resources to preventing such a truthful claim from being asserted? And if it did so, in what way would the public interest have been served?

The Commission's theory has an almost metaphysical quality that is divorced from practical considerations as well as logic. The consumer is supposed to be misled although he can verify the complete truthfulness of every proposition by which he was induced to buy. The advertiser may display a painting and say, "This is how my product looks," but if he displays a photograph and makes the same assertion, he is held to have automatically superadded a "proof" of his assertion that materially influences the purchasing decision and would be contradicted by the undisclosed use of a mock-up. This is theorizing minus evidence and expertise.

Nor does the honest use of mock-ups unfairly disadvantage competitors by depriving them of opportunities for providing "real experimental proof" of their claims (Gov't Br. pp. 15-16, 20). The image on the television screen is not the physical reality and cannot "prove" anything about a product; it can only portray or demonstrate its capabilities. If the demonstration faithfully reflects what the product can do, if the claims advanced are truthful and verifiable by the purchasers—as by hypothesis they are—then all honest competitors are on a parity, whether or not they have found it needful to use mock-ups.

The actual effect of the *per se* rule would be to impose futile restrictions on honest advertisers and advertising agencies and, if anything, to disadvantage the scrupulous ones that would strain to observe the letter of the rule in every jot and tittle. The Commission believes that if a claim cannot be presented without the use of mock-ups, then "the seller may be obligated to forego use of the demonstration form of advertising" (R. 55). In short, advertising effectiveness must yield to academic purism, without regard to any deception of the consumer.

The Commission has suggested, with respect to uncertainties in the application of its third final order, that the respondents may come to it for "definitive advice, in advance, as to whether proposed conduct would meet the requirements of the order" (Gov't Br. p. 23). Apart from questions as to the availability of the Commission to give prompt attention to such requests for advice, or the ability of the staff to act for the Commission, the procedure covers only persons who are subject to an order and could not help in resolving the uncertainties that would result for the advertising industry as a whole from the approval of the Commission's theory. Even if such a

procedure were established, resort to it would be impracticable in view of the conditions under which advertisements are produced. The barest sketch of the steps involved in making a television commercial indicates the complexity of the process and the importance of the time factor.

The advertiser and the advertising agency first establish a calendar deadline and determine the length and type of use of the commercial. The agency immediately undertakes to purchase suitable time spots and begins to develop rough ideas for copy and art. These culminate after a period of weeks in a "storyboard"—a series of sketches showing how the finished commercial will appear on the screen,—together with accompanying script. The storyboard is submitted for approval to the advertiser and perhaps to the network clearance departments and the Code Office of the National Association of Broadcasters. Composition of music, hiring of musicians, recording of the music and of off-camera sound effects, may be going on at the same time.

At this stage, if all approvals have been obtained, bids are sought from film producers, a studio is selected and a shooting date fixed. The agency must audition performers and perhaps negotiate a lengthy talent contract with a star. After filming, the negative goes to a laboratory for processing, animated sequences and optical effects may be added, and the sound tracks are mixed and re-recorded on the film. The composite "work print" is submitted for final approval to the advertiser and in some cases to the networks. Prints are then made and shipped to the stations and networks on which time has been purchased.

The entire procedure requires two months for a "rush job" and up to six months for an animated commercial.

The release date of the commercial is often critical. It may be timed for a seasonal demand, for a particular holiday, to tie in with a public event like the Olympic Games, or to accompany an over-all promotional campaign of the advertiser. In these cases delay past the deadline would destroy the commercial's value.

In 1963 advertising agencies produced 52,000 commercials, of which 40,000 were filmed and the rest were live or taped.[6] They produced a much greater number of print advertisements, to which similar considerations apply, though in lesser degree. The establishment by the Commission of some kind of prior review procedure to sort out the incidental from the material use of mock-ups would obviously fail to meet the needs of the industry, even if it could be otherwise justified.

The impact of the Commission's *per se* rule on advertisers and advertising agencies having a legitimate need for mock-ups must, then, be adverse. The Court has held that it will not sanction a *per se* rule of illegality lacking adequate knowledge of the "economic and business stuff" out of which the challenged arrangements emerge. *White Motor Co.* v. *United States*, 372 U. S. 253, 263 (1963). The instant appeal, which has been brought by the Commission to test a hypothetical assumption and comes up on a record lacking any evidence as to the industry's need for legitimate mock-ups, would appear to call for similar restraint.

[6] Figures obtained from Film Producers Association and the Television Bureau of Advertising.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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